FILED
JUN 21 1926
R. STANSBURY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 465

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WALLACE R. FARRINGTON, Governor of the Territory of Hawaii, WILLIAM B. LYMER, Attorney General of the Territory of Hawaii, and WILLARD E. GIVENS, Superintendent of Public Instruction of the Territory of Hawaii,
Petitioners,

vs.

T. TOKUSHIGE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for the Ninth Circuit,
AND BRIEF IN SUPPORT THEREOF.

WILLIAM B. LYMER,
Attorney General of the Territory of Hawaii,

MARGUERITE K. ASHFORD,
First Deputy Attorney General of the Territory of Hawaii,
Attorneys for Petitioners.

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To the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable William Howard Taft, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioners herein deeming themselves aggrieved by the judgment in the case of "Wallace R. Farrington, Governor of the Territory of Hawaii, William B. Lymer, Attorney General of the Territory of Hawaii,

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and Willard E. Givens, Superintendent of Public Instruction of the Territory of Hawaii, Appellants, vs. T. Tokushige, et al., Appellees," No. 4667, by the United States Circuit Court of Appeals for the Ninth Circuit, now make and file this their petition for a writ of certiorari for its review.

Your petitioners file herewith a certified copy of the entire transcript of record of said case, including the proceedings in said Circuit Court of Appeals.

Your petitioners respectfully show:

The Legislature of the Territory of Hawaii, by Act 30 of the special session of 1920, as amended by Act 171 of the session of 1923, and as further amended by Act 152 of the session of 1925, which laws are set forth in full in the appendix to this petition and brief in support thereof, regulated the foreign language schools of the Territory of Hawaii. The first two of these Acts are now Chapter 32 (Sections 390-399) of the Revised Laws of Hawaii, 1925 (R. 56-66).

Under each of these laws as passed, certain foreign language schools of the Territory instituted court proceedings to determine the validity thereof, but the proceeding now before this Court is not concerned with those causes save the equity bill brought upon June 13, 1925, in the United States District Court of the Territory of Hawaii, seeking a sweeping injunction against the enforcement of all the provisions of the various statutes regulating the foreign language schools and the regulations adopted by the Territorial Department of Public Instruction under the powers granted it by those laws (R. 4-68).

Under this bill a temporary restraining order was issued ex parte forthwith but was not served on defendants until Monday, the 15th (R. 69-72). The plaintiffs' schools had not been in session for several weeks but re-opened on that Monday. The bill, in the view of the petitioners herein showed no immediate danger of irreparable injury but did show that Act 30 had been enacted more than four and one-half years, and Act 70 more than two years, previously, and that Act 152, which had been recently enacted, merely perfected the remedies for enforcing the payment of the license fees and expressly provided that the fees might be paid under protest and that suit might be brought to recover them back if their validity was questioned; it further provided that no injunction should issue from any Court to prevent their collection (R. 4-68).

After long delay against the protest of petitioners herein, a hearing was had upon petitioners' motion to dissolve the temporary restraining order, which motion was ultimately granted (R. 171-176).

Thereafter, following the filing of a number of affidavits on both sides, together with a motion for a preliminary injunction on the part of the plaintiffs in the District Court, a hearing was had upon the motion for the issuance of a preliminary injunction (R. 177). That motion was granted by the District Judge without argument by counsel (R. 178), and an appeal taken therefrom to the Circuit Court of Appeals for the Ninth Circuit under Section 129 of the Judicial Code (amended by Act of February 13, 1925).

Upon the appeal, the main contentions of petitioners herein were that equity could not enjoin the enforce-

ment of the foreign language school laws because (1) the plaintiffs had an adequate remedy at law, (2) the proceeding was not the kind of case in which equity could enjoin the prosecution of a civil or criminal proceeding, (3) the legislation was constitutional, and (4) aside from the foregoing, the circumstances were such that an injunction should not issue as a matter of sound judicial discretion.

After a hearing in the Circuit Court of Appeals, that Court sustained the decree of the District Court allowing the preliminary injunction upon the ground that the foreign language school laws of the Territory abridged the privileges and immunities of citizens of the United States and deprived them of liberty and property without due process of law (R. ...).

The result of this decision was that as the ultimate merits of the case had been determined by the decision of the Circuit Court of Appeals declaring the law unconstitutional, no further proceedings were either necessary or possible in the District Court. The other points raised and argued by the appellants could not affect the controversy while the judgment of the Circuit Court of Appeals remained unreversed.

Petitioners submit that the judgment of the Circuit Court of Appeals was erroneous in that it held unconstitutional the foreign language school law of the Territory which regulated but did not prohibit the conducting of foreign language schools.

Wherefore, and for the reasons set out at length in the brief filed herewith in support of this petition, petitioners pray that a writ of certiorari be issued to the

United States Circuit Court of Appeals for the Ninth Circuit, commanding it to certify to this Court for its review and determination a transcript of the proceedings in said case and that the judgment of said court be reversed.

Dated at Honolulu, Hawaii, this 7th day of June, 1926.

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Respondents.

BRIEF ON PETITION FOR WRIT OF CERTIORARI

OPINIONS IN THE COURTS BELOW

A Writ of Certiorari is now sought to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, made and entered in the case of Wallace R. Farrington, et al., appellants, vs. T. Tokushige, et al., appellees, Number 4667 (opinion not yet officially reported and herein appearing at R. 187.), which said judgment affirms the order of the United

States District Court for the Territory of Hawaii, made and entered in the case of T. Tokushige, et al., plaintiffs, vs. Wallace R. Farrington, et al., defendants, issuing a preliminary injunction (no written opinion, order appears, R. 129), enjoining defendants therein and each of them from enforcing the Foreign Language School Acts in any manner therein set forth.

JURISDICTION OF THIS COURT

The judgment now sought to be reviewed was entered in and by the Circuit Court of Appeals for the Ninth Circuit on March 22, 1926 (R. 201.).

The specific claim advanced and ruling made in the Circuit Court of Appeals, which is relied upon as the basis of this court's jurisdiction, is as follows:

The question involved is one of grave public importance, involving as it does the policy of the Territory of Hawaii in regulating the Foreign Language Schools of the Territory. If the judgment of the Circuit Court of Appeals stands, its substantial effect is to free the numerically preponderant element in the Territory, that is, aliens, from any restraints in the education of their children—American citizens—in a way that will destroy their understanding of and sympathy for American institutions and their allegiance to the Territory and to the United States.

The courts below have held on the issuance of a preliminary injunction that these laws do not fall within the police power of the Territory and are unconstitutional.

Jurisdiction is invoked under Section 240 of the Judicial Code and under Rule 35, 5-B of this Court, particularly that portion reading: "or has decided an important question of Federal law, which has not been, but should be, settled by this Court."

STATEMENT OF FACTS

In 1920 a Federal Commission, acting under the United States Commissioner of Education, issued an official report entitled "A Survey of Education in Hawaii." This was published officially as a public document by the United States government as Bulletin 1920, Number 16.

Throughout the proceedings of this cause it has been conceded that the situation in Hawaii with regard to Foreign Language Schools is a matter concerning which the court may take judicial notice. As the Survey, just referred to, is perhaps the best account of the conditions in the Foreign Language Schools, which the legislation of Hawaii designed to meet, ten copies are being forwarded with this petition and brief. Reference will be made to the situation as developed by that Survey.

In view of the predominating number of Japanese among the alien population of Hawaii, the situation in the Japanese Language Schools was the subject of an intensive study by the Federal Commission (Survey pp. 105-143). This Commission found that in those schools, which ran both before and after the hours during which the public schools were in session, so that a Japanese child's school day ran practically from dawn to dusk (Survey p. 114), the instructors were funda-

mentally alien in their viewpoint, all of them having been imported from Japan for the purpose of instruction in these schools (Survey pp. 113-114). The books used were found to be slightly revamped from the original Japanese texts published under the supervision of the Japanese government (Survey pp. 116-125). Even in these revised editions used in Hawaii the Japanese flag was held up to reverence and the Japanese Emperor referred to as "our Emperor" (Survey p. 118).

The Survey, moreover, found that due to the sessions of these Foreign Language Schools being held in some instances before the public schools, in other instances afterwards, and in still other instances both before and after, without vacation on Saturday and with very little vacation during the entire year, the resulting fatigue of the children, as well as the nationalistic type of instruction, seriously hampered the effective instruction of the child in the public schools (Survey pp. 114, 127-130).

The Commission reached the conclusion (Survey p. 134) that the Language Schools "are centers of influence which, if not distinctly anti-American, are certainly un-American."

Following this report, Act 30 of the Session Laws of 1920, the first of the Foreign Language School laws, was enacted.

This law (p. i, Appendix) provided that no one should conduct or teach in a Foreign Language School without a permit from the Department of Public Instruction. No fees were imposed but the applicant was required to give a pledge to observe the law and the

regulations of the Department thereunder and to the best of his ability to direct the minds and studies of the pupils in such a way as would tend to make them good and loyal American citizens and not to instruct them in a way inconsistent therewith. A permit might be revoked for cause after notice and an opportunity to be heard. Teachers were required to qualify in knowledge of ideals of democracy, American history and institutions and the English language, but the requirement as to English was to be liberally construed for a period of two years so as to afford sufficient time to qualify. Subject to modification by the Department, in case it should find that it could do so consistently with the object of the Act, the Foreign Language Schools were not to hold sessions before or during the sessions of the public schools and, although the afternoon sessions might be longer than one hour, no pupil was to attend more than one hour a day nor more than six hours a week nor more than thirty-eight weeks a year. The Department was authorized to prescribe the courses of study and the text books but not to furnish books at its expense. The penalty for a violation of the Act was a fine not to exceed $25. In order to allow ample time for preparation, the Act was not to take effect until July 1, 1921, although enacted November 24, 1920.

Under this law certain regulations were passed by the Department of Public Instruction. These regulations prescribed that up to September 1, 1923, pupils should have first satisfactorily completed the public school first grade or its equivalent and thereafter the first and second grades or their equivalent before at-

tending a Foreign Language School; also that beginning September 1, 1923, and thereafter, for grades one, two and three, and beginning September 1, 1924, and thereafter, for grades four and above, all new text books used in elementary Foreign Language Schools should be based upon the principle that the pupil's normal medium of expression is English and should contain as far as practicable English equivalents for foreign words and idioms.

The statute having been contested by some of the Japanese Language Schools and the Judge who tried the case having held that although the Act itself was valid, the regulations were not, the Legislature thereupon in 1923 by Act 171 amended Act 30 of 1920 (Appendix p. iv), in large part by incorporating in the Act the substance of the regulations of the Department of Public Instruction at the same time enlarging the powers of the Department in the making of regulations.

Also, in view of additional light which had been thrown on the whole situation, the Legislature deemed it advisable to provide and did provide for the appointment of one or more inspectors of the Foreign Language Schools; and, in order to provide the necessary funds for this and for other expenses in connection with the Foreign Language Schools, the payment of a license fee at the rate of $1 per pupil per school year (Sept. 1-Aug. 31) was required as a prerequisite to obtaining a permit, and all of the proceeds of the fees were appropriated for the expenses of carrying out the Act, but it was provided also that if the fees should yield more than was necessary for that purpose the

Department might reduce them. In addition the schools were required to make annual reports to the Department, and it was provided also that if any part of the Act should be held unconstitutional or invalid that should not affect the vaiidity of the Act as a whole or of any other part.

Finally the Legislature of 1925, because of the difficulties in collecting fees owing to the elusive nature of the Language Schools as being not only unincorporated associations but without constitutions or by-laws and of uncertain or unascertainable membership, enacted Act 152 (Appendix p. x), amending the provision of the law relating to fees by providing that the fees should be payable by the schools whether they took out permits or not (the law previously having made the payment of a fee merely a prerequisite to obtaining a permit and the remedy merely a penal prosecution for conducting a school without a permit), by providing civil and penal remedies for their collection, and by prohibiting the issuance of injunctions against either civil or penal remedies as to the fees but providing also that the fees might be paid under protest and that action might be brought to recover them back if their validity should be questioned. This Act was not to become operative until the 10th of May.

Following the enactment of this last law the plaintiff schools closed for several weeks and then brought this suit in the United States District Court at Honolulu, June 13, 1925. Upon obtaining the temporary restraining order issued upon the filing of their suit, they then reopened and are now running.

Upon the hearing of the cause before the District Judge, after extended argument upon the motion to dissolve the restraining order and as a result of certain further proceedings in the cause, a temporary injunction was issued restraining the defendants from enforcing the various Acts in any of the modes enumerated in the court's order (R. 178). From that order the defendants appealed to the Circuit Court of Appeals for the Ninth Circuit (R. 149), where the judgment of the court was entered affirming the order of the District Court upon the ground that the Foreign Language School laws of the Territory were unconstitutional and without the scope of the police power of the Territory.

ASSIGNMENT OF ERRORS

The petitioners herein rely particularly upon the assignment of error made in the Circuit Court of Appeals and here repeated that the Foreign Language School Acts of the Territory are constitutional.

"I. (17)

"Said Judge erred in so enjoining or causing to be enjoined the plaintiffs, notwithstanding that said Acts and regulations and the several provisions thereof are constitutional and valid, and in not holding that the same are constitutional and valid as to each of said provisions." (R. 155.)

II.

The court erred in declaring the entire statute unconstitutional without regard to the fact that the various provisions thereof were independent of each other.

ARGUMENT

The Foreign Language School laws of Hawaii do not violate the Constitution nor do they fall within the actual decisions of this Court in the recent Nebraska, Iowa and Oregon cases.

The great question before this court is whether or not this case falls within the actual decisions of this court in *Pierce v. Society of Sisters*, 268 U. S. 510, *Meyers v. Nebraska*, 262 U. S. 390, and *Bartels v. Iowa*, 262 U. S. 404. The Circuit Court of Appeals held that the decisions in those cases govern the case at bar. The petitioners herein contend that those cases govern prohibitory legislation alone and not purely regulatory legislation such as has been adopted by the Legislature of Hawaii which attempts rather to supervise and control than to abolish Foreign Language Schools.

The petitioners herein feel that the decisions of the court in *Meyers v. Nebraska* and *Bartels v. Iowa* support rather than militate against the constitutionality of the Hawaiian legislation relating to Foreign Language Schools.

The Nebraska statute absolutely prohibited (1) the teaching of any subject in any language other than the English language in any school, public or private, and irrespective of the age or stage of development of the pupils or students, and (2) the teaching of any language as such, whether the teaching of it was in that language or in the English language, to any pupils whether in public or private schools until the pupils should have successfully passed the 8th grade, that is, should have been prepared to enter the high school. The

Iowa and Ohio statutes were of a similar nature. Those Acts thus absolutely prohibited the teaching of any subject in a foreign language at any time and any foreign language until after the primary and grammar grades and in effect abolished a large group of schools altogether. The Acts now in question do not prohibit the teaching of foreign languages at all nor do they at all prohibit the teaching of those languages in the languages themselves, nor do they in effect abolish any schools or even handicap them in any way to which exception can be taken. The decision in the second case, Bartels v. Iowa, covering the Iowa and Ohio statutes, merely follows the decision in the first case, Meyers v. Nebraska, and the dissenting opinion of Justices Holmes and Sutherland in both cases is found at page 412 in the second case. The reasoning of the majority of the court is found in the first case. Even the majority considered the object of the Act praiseworthy but held that the legislature undertook to accomplish it in a wrong way—that being a prohibitory as distinguished from a regulatory statute and the occupation being one which was useful in itself and therefore subject only to regulation. The Court said on pages 400, 402:

"The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. * * * "

"The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy

to appreciate. Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown. * * *"

"Our concern is with the prohibition approved by the Supreme Court. Adams v. Tanner, supra, p. 594, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State."

In these passages the Court shows the real basis of its decision—that the Act was one of "abolition" and it distinctly states that "regulation may be entirely proper." Then, apparently in order to insure that it would not be misunderstood, it went further in other parts of the decision and said much more that would justify the legislation now in question as follows, on pages 400, 401, 402:

"The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently pro-

moted. The Ordinance of 1787 declares, 'Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.' Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.

"Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. * * *"

"That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. * * *"

"The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. * * *"

In the Oregon case of Pierce v. Society of Sisters of Holy Names, 268 U. S. 510, the Act, as a prohibitory act, went even further than the acts of Nebraska, Iowa and Ohio. It prohibited attendance of children between the ages of eight and sixteen years at any school other than a public school during the portion of the year in which the public schools were in session in the respective districts in which the children resided, except in special cases in which the children were not normal or had completed the eighth grade or resided

at considerable distances from any public school, etc. The State Court was not called upon to pass upon the validity of the Act, but its invalidity was so patent that doubtless that court would have held it unconstitutional. The lower Federal Court as well as the Federal Supreme Court unanimously held it invalid. But, in this case also as in the Nebraska case, the court evidently did not wish to be misunderstood and hence it said, on page 534:

"No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."

It would seem as if nothing more could be desired in order to support the Acts in question than these opinions of the Federal Supreme Court. It would indeed, we submit, be a sad commentary on our system of government as well as a shock to our common sense to hold that the Territory must stand by impotently as a mere onlooker and watch its foreign-born guests conduct a vast system of schools of American pupils—keeping these infants at it from dawn to dusk before and after the public school hours, teaching them loyalty to a foreign country and disloyalty to their own country, and hampering them during their tender years in the learning of the home language in the public schools; to hold that the Territory could not by mere regulatory

measures even alleviate these evils to a moderate extent while not interfering in the least with the proper maintenance of these schools or the teaching of foreign languages in them but on the contrary making them more efficient for this their declared main object. And yet this is the substance of the plaintiffs' contention—in the face of the pronouncements of the highest court in the land that the American people have always regarded education as a matter of supreme importance; that religion, morality and knowledge are necessary to good government and the happiness of mankind and hence justify the encouragement of schools and the means of education; that compulsory educational laws are justifiable; that education of the young is possible only in schools conducted by especially qualified persons; that the State may go very far in order to improve the quality of its citizens physically, mentally and morally; that it may compel attendance at some school and make reasonable regulations for all schools and even require the teaching of English; that it may reasonably regulate all schools and inspect, supervise and examine them, their teachers and pupils; that it may require all children of proper age to attend some school; that teachers shall be of good moral character and patriotic disposition; that certain studies plainly essential to good citizenship be taught and that nothing be taught which is manifestly inimical to the public welfare. The justification of the establishment and maintenance of the public school system is the future general welfare of the state as well as the welfare of the persons immediately concerned who are not fully *sui juris;* and that is the justification of the legislation

now in question. It is of course immaterial that the criticism of these schools is not equally applicable to all of them or not at all applicable to some of them—especially at the present time. The general situation is what must be considered and that too at the time of the passage of the legislation or as it might be now but for the legislation.

Even if one or more of the provisions of the Foreign Language School Acts be unconstitutional, the remainder of the Act, if found constitutional, should be declared valid.

The majority opinion in Berea College v. Kentucky, 211 U. S. 45, the dissenting opinion in which was quoted by the Circuit Court of Appeals in its decision, holds in no uncertain terms that one section of a statute may be repugnant to the Constitution without rendering the whole Act void and in a like manner one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the other provisions may be subject to no constitutional infirmity. The only question to be considered in such case is whether such provisions, the constitutional and the unconstitutional, are so inter-dependent that one cannot operate without the other.

It is respectfully urged that in this case, if this court shall determine that the Circuit Court of Appeals was correct in holding one or more of the provisions of the Foreign Language School laws invalid as repugnant to the Constitution, it should yet sustain such provisions of the law as do not fall within the constitutional prohibitions.

The provisions of the Acts are not essentially interdependent. That is shown by the growth of the law, one or two provisions being contained in the first enactment and others being added or the original ones modified from time to time as experience suggested new manners of dealing with the situation.

CONCLUSION

It is submitted that not only is the Foreign Language School law constitutional, being a regulatory and not a prohibitory law and therefore within the restrictive language of this court in the Nebraska, Iowa and Oregon cases, but that there is enough in the law to uphold it even though specific portions be invalid as unconstitutional and be stricken from the Act in its operative effect.

Respectfully submitted,

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(APPENDIX FOLLOWS.)